



# IC – IC: Institutional Controls in Indian Country

Barbara Harper & Stuart Harris  
Confederated Umatilla Tribes

IC Meeting

April 4-6, 2006; Tuscon

# Messages:

- Tribes have a unique international relation with the federal government – Treaties and Trusteeship
- ICs are not seen as a solution; they often make the problem worse.
- ICs must be mitigated.
- “It’s our food whether it is contaminated or not.”



# HANFORD

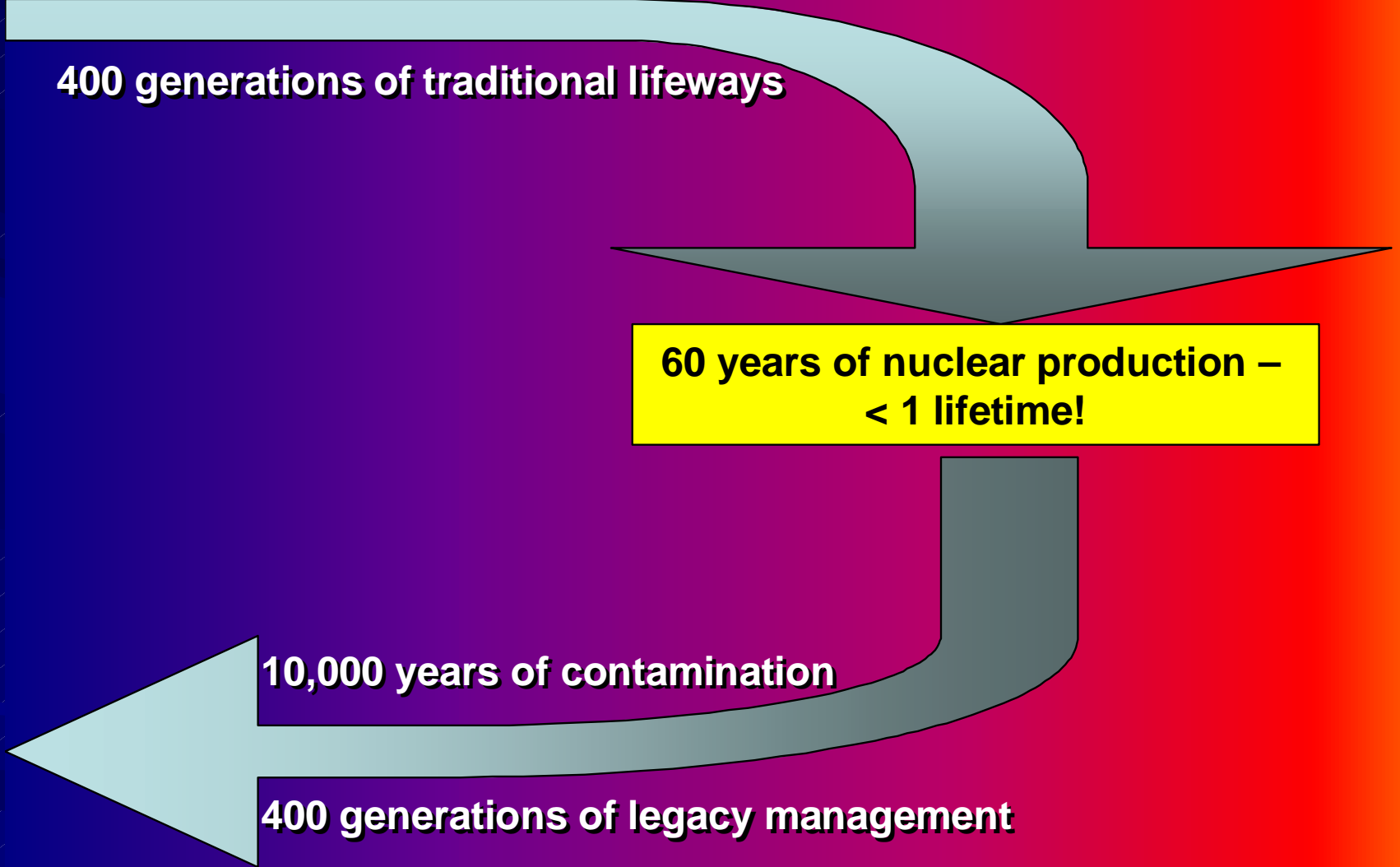
10,000 years of undisturbed habitat

400 generations of traditional lifeways

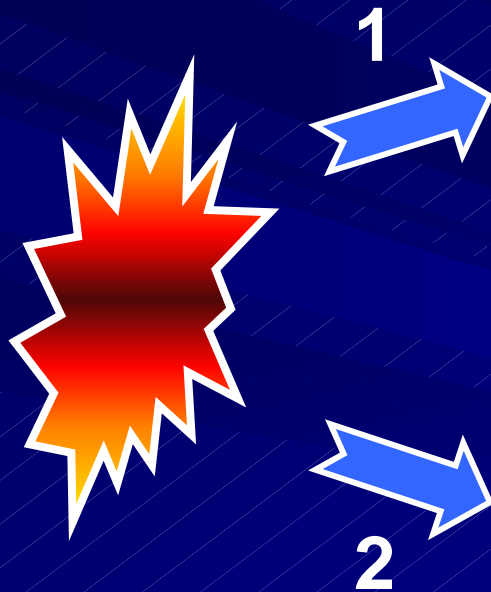
60 years of nuclear production –  
< 1 lifetime!

10,000 years of contamination

400 generations of legacy management



# Remedy Selection

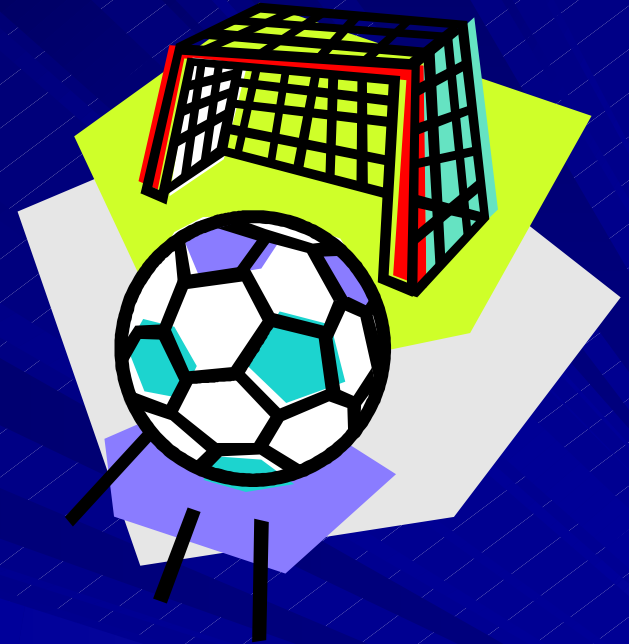


**Make the site clean & whole**  
**Full restoration; No IC needed**  
**Unlimited Use – Unrestricted Exposure**  
**Safe for Aboriginal or Treaty Rights**  
**Culture, Religion, Health, Subsistence**

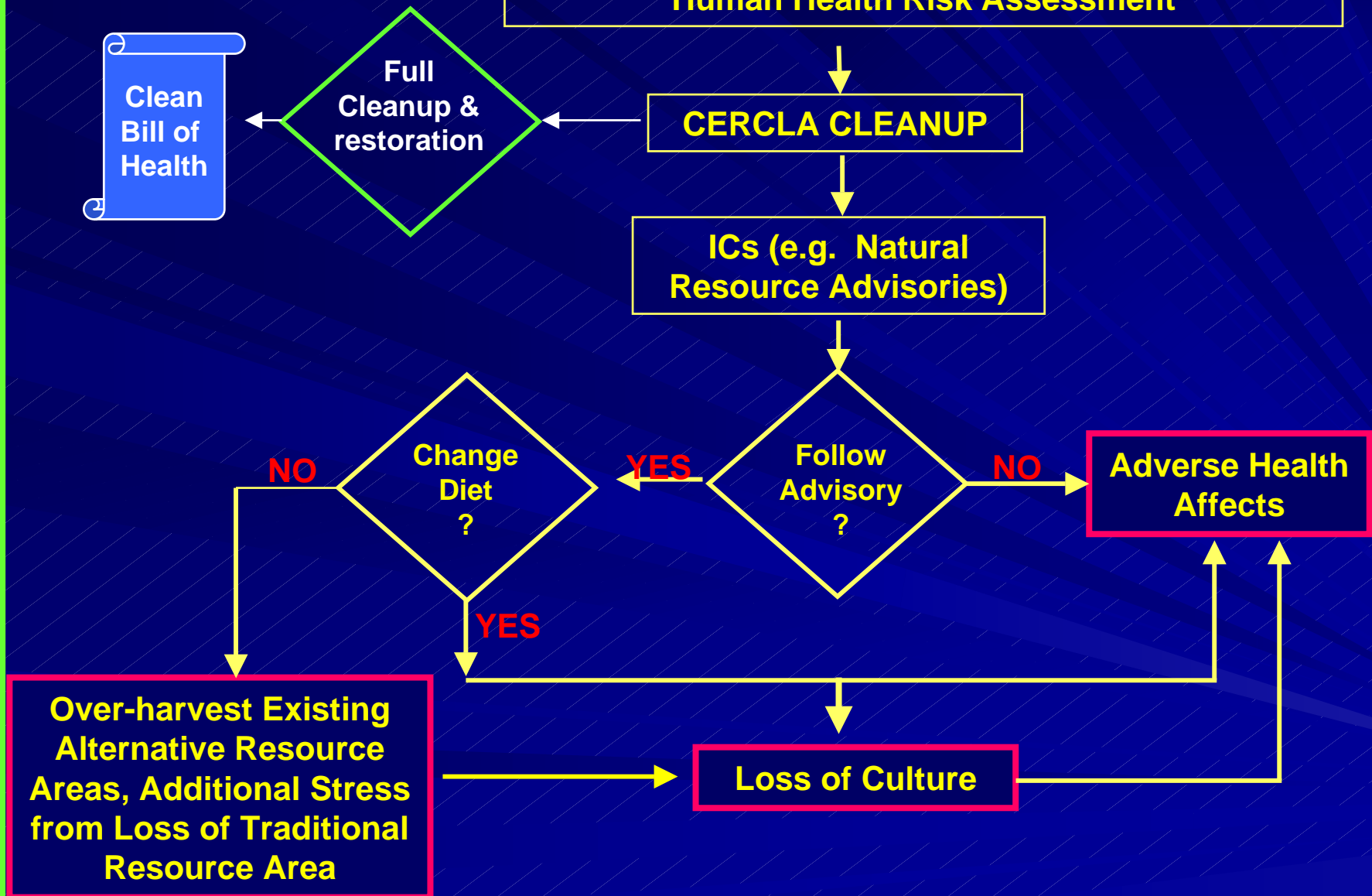
***If* Baseline cannot not fully regained**  
**Cannot achieve UU / UE**  
**Triggers NRDA, even if ‘voluntary.’**  
**Requires IC**  
**-- *then it* Requires mitigation for lost**  
**resources and lost use**

# Definitions

- Includes engineered barriers, administrative controls, resource advisories.
- Risk reduction applies to human health, ecological health, cultural health, community health.  
These are Inseparable.
- Disconnect between ecorisk methods and measures of ecosystem functions and services.



**MULTI-PATHWAY, MULTI-MEDIA, MULTIPLE COC,  
Human Health Risk Assessment**



# NRDA-CERCLA Integration

- EPA Policy to Integrate them (9200.4-22A)
  - Even if funding must be kept separate.
- IC-NRD overlap (ICs prove injury)





# Additional Factors in IC-IC

- Several states consider land use restrictions as takings. Tribes also consider ICs as a violation of Treaties and Trusteeship by the federal government as a whole.
- Every Tribal citizen knows that Treaty rights must be exercised whether there is contamination or not. Use it or lose it.
- Misnomers: “open space” “green space” or Brownfields have been misrepresented to Tribes. These are ICs and restricted uses.



# Additional Factors - cont -

## ■ ICs are expensive.

- Costs of implementing ICs include planning, record keeping, education, monitoring, enforcement, inspection, 5-year reviews, signs, replacement of barriers and caps, etc.
- A more expensive remedy may actually be more cost-effective, especially if all costs and benefits are considered.

## ■ Tribes may not have technical capacity yet.

- We need some ‘nation-building’ help.

## ■ Tribes may not trust the federal government.

- Neither the warning nor the assurance is trusted; must have funds for independent verification.

# Additional Factors - cont-

- **ICs require cooperation**
  - community members and leaders must understand their terms and the importance of compliance and agree to them.
  - This requires G2G consultation, not simply “education using sound science.”
  - Goal is not to define “appropriate land use.” Our Treaty is our land use plan and defines our endstate goal.
- **Whoever bears the burden of residual contamination should be a decision maker, not just a commentor or token participant or public “stakeholder.” We are sovereigns.**
- **States do not have the same relation with Tribes, do not have to honor Treaties; often fight them.**

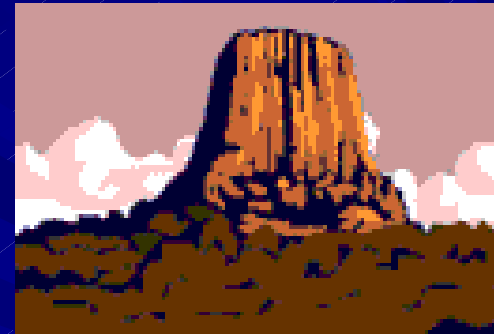
# Messages:

- A blank look doesn't mean *they* don't get it.
- The goal is not to “help Tribes make healthy decisions” but to make natural resource use safe.
- A public health success may be a cultural disaster.
- Do your homework – learn about the resource/area the IC will apply to. What values, attributes, uses are affected? Some attributes have no *de minimis* thresholds or gradient. Religious freedom.



# Opens the door for Creative Solutions

- ICs must come with stable funding
- ICs must come with data
- ICs must come with monitoring
- ICs must come with mitigation:
  - Replacement or restoration in some ratio (such as 3:1 x time; cultural service acre-years).
  - Not just access to fed land. Must allow Tribes to be sovereign = manage the resources and self-regulate its citizens.
  - However, cannot 'sell' Treaty rights or cultural resources or religion. Placing value on unique and priceless resources is a problem, but failing to do so may cause them to be treated as worthless.



# “Making Whole”

- In order to better account for the indirect costs of restricted site use, ELI recommends that EPA and Congress consider including the relative social [cultural] benefits of the different alternatives as a criterion for choosing the appropriate remedial action.



- *RA framework likewise.*
- *From: 2000 ELI Research Study: Protecting Public Health at Superfund Sites: Can Institutional Controls Meet the Challenge?*



# Last Thoughts

- The US government is seen as a single entity. *“Not my program.”*
- V-PESS (valuation of the protection of ecosystems and services)
- A wide variety of solutions might be tried, including full funding of IHS-identified health care, construction of BIA schools and funding teachers, expansion of Johnson-O'Malley scholarships, removal of dams, non-competitive grants, etc.



**Think outside the box**

# Contact info

**Stuart Harris (CTUIR) [Stuartharris@ctuir.com](mailto:Stuartharris@ctuir.com)**

**Barbara Harper (CTUIR) [bharper@amerion.com](mailto:bharper@amerion.com)**

**Jason White (Cherokee; Tribal Superfund Working Group) - [jwhite@cherokee.org](mailto:jwhite@cherokee.org)**